

N.D.A.G. Letter to Johansen (Jan. 8, 1998)

January 8, 1998

Mr. Douglas G. Johansen
State Seed Commissioner
North Dakota State Seed Department
State University Station
PO Box 5257
Fargo, ND 58105-7214

RE: Seed Commission Administrative Rules

Dear Mr. Johansen:

I have received letters from you and John Walstad, Code Revisor for North Dakota Legislative Council, regarding the September 27, 1997, meeting of the Administrative Rules Committee, during which the Committee reviewed proposed rules of the Seed Commission. You have asked for an "unofficial opinion" regarding the proposed rules and certain questions raised by the Committee.

The proposed rules, in relevant part, amended N.D. Admin. Code Section 74-04-01-04 to increase the potato grade inspection fee from 6.5 cents to seven (7) cents per hundredweight. It is my understanding that when Committee members inquired about the fee increase, you informed them that the seven-cent fee had been collected for a "couple of years," and that the rule change was to match the fee which was being collected. I also understand that when Committee members asked how the increased fee could be collected prior to corresponding rule change, you responded that the Seed Commission was advised by an assistant attorney general and a former Commissioner of Agriculture that this was permissible.

Documents from this office indicate that a similar issue arose during a November, 1989 Seed Commission meeting, during which Commissioner of Agriculture Sarah Vogel inquired about an increase in fees charged for lab tests. The fee increase had been approved by the Seed Commission 15 months prior to the meeting, and approximately \$30,000 in fees had been collected. Commissioner Vogel questioned whether the fees could be collected without a change in administrative rules, and following the meeting, Deputy Commissioner of Agriculture Jeff Weispfenning sent a memo to this office asking for a legal opinion. Assistant Attorney General Lisa Turrini responded to the inquiry in a December 6, 1989, memo, in which she concluded that because N.D.C.C. § 4-09-08 provided that the Commissioner, by rule, shall prescribe the fees, the fees could not be increased without promulgating administrative rules. Ms. Turrini also concluded that any person who was charged the increased fees could make a claim for a refund, and suggested that the Commission attempt to refund the difference between the increased amounts and the previous fees.

At the time of Commissioner Vogel's inquiry and the following memo from Ms. Turrini, N.D.C.C. § 4-09-08 provided, in relevant part:

4-09-08. Public laboratory service - Free tests - Fees for additional tests. . . . The commissioner, by rule, shall prescribe the time of year when seed samples will be accepted for free tests, the fees which will apply to samples submitted by any resident of the state in excess of three, and the fees which will be charged for all other laboratory tests and services.(Emphasis added.)

During the 1991 Legislative Session, N.D.C.C. § 4-09-08 was amended to eliminate the words "by rule" from the section, and the requirement that the fees be approved by the Seed Commission was added. Other changes were made during the 1995 and 1997 Legislative Sessions, and N.D.C.C. § 4-09-08 now provides:

4-09-08. Public laboratory service - Fees for tests. The commissioner shall accept samples submitted to the state laboratory for testing and shall determine the types of tests to be conducted on the samples. The commissioner, with the approval of the seed commission, shall establish and charge fees for laboratory tests and services.

N.D.C.C. § 4-09-08 no longer requires the promulgation of rules to establish fees for testing, but merely requires the approval of the Seed Commission. In addition to establishing fees for lab tests, the Seed Commission also establishes fees for potato grade inspection and seed certification. With respect to seed certification, N.D.C.C. § 4-09-16(6) provides that the commissioner shall "[e]stablish an equitable schedule of fees and charges . . . for other work and duties incident to the growing, handling, marketing, and certifying of North Dakota seed[.]" N.D.C.C. § 4-10-02 requires the commissioner to direct the inspection, certification, and promotion of quality of seed potatoes, provides that the fees for the cost of performance of these duties must be established by the Seed Commission with the approval of the directors of the North Dakota Seed Potato Growers Association. Accordingly, the Seed Commission is not required to promulgate administrative rules to establish fees for potato grade inspection, seed certification, or laboratory testing.

In addition to the above statutes relating specifically to the Seed Commission, N.D.C.C. § 28-32-01(11)(c) excludes from the definition of a "rule" a rule establishing specific prices to be charged for particular goods or services sold by an agency. Accordingly, an agency establishing such prices for goods or services is not required to follow the administrative rulemaking procedure set forth in N.D.C.C. ch. 28-32. The potato grade inspection fees established by the Seed Commission are prices for services as defined in N.D.C.C. § 28-32-01(11)(c). This statute supports the conclusion that the Seed Commission is not required to promulgate administrative rules under N.D.C.C. ch. 28-32 when establishing fees.

While the Seed Commission is not required to promulgate rules to establish fees, it may choose to do so. However, N.D.C.C. § 28-32-03(3) provides:

Upon coming effective, rules have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the committee on administrative rules, or determined repealed by the office of the legislative council because the authority for adoption of the rules is repealed or transferred to another agency.

Therefore, if the fees are established in rules, the Commission is bound by the amounts set forth in the rules, and may not increase the fees without repealing or amending the rules.

I hope this information is helpful.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

cc: John Walstad